***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

To be argued by
Jerome F. O'Neill

Docket No. 76-1381

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA — Appellee

v.

DANIEL H. GEORGE, JR. — Appellant

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Appeal from the United States District Court for the District of Vermont

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# BRIEF FOR THE UNITED STATES

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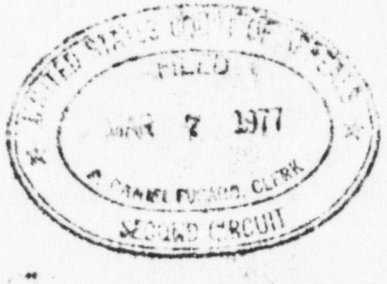


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# BRIEF FOR THE UNITED STATES

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## PRELIMINARY STATEMENT

Daniel H. George, Jr. appeals from a judgment and conviction entered on August 3, 1976, after a nine-day trial before the Honorable Albert W. Coffrin, United States District Judge, and a jury. An indictment, bearing criminal number 76-2 and filed January 14, 1976, charged Daniel H. George, Jr. and co-defendants Jay Leavitt, Joan Leavitt and Daniel Pappalardo in seven counts as follows: Count I charged defendants George and Jay Leavitt with distribution and possession with intent to distribute approximately 83 grams of amphetamine in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2; Count II charged defendants George and Jay Leavitt with distribution and possession with intent to distribute approximately 144 grams of amphetamine in violation of

21 U.S.C. § 841 and 18 U.S.C. § 2; Count III charged defendants George and Jay Leavitt with distribution and possession with intent to distribute approximately 330 grams of amphetamine in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2; Count IV charged defendants George, Jay Leavitt and Pappalardo with distribution and possession with intent to distribute approximately 308 grams of amphetamine in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2; Count V charged defendants George and Jay Leavitt with distribution and possession with intent to distribute approximately 996 grams of amphetamine in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2; Count VI charged defendant Jay Leavitt with the use of a communications facility in committing and in causing and facilitating the knowing and intentional distribution and possession with intent to distribute by Jay Leavitt, Wayne Holden and Norman Holden of a quantity of amphetamine in violation of 21 U.S.C. §§ 841, 843(b); Count VII charged all defendants and thirteen named co-conspirators with conspiracy to manufacture amphetamine and methamphetamine and conspiracy to distribute and possess with intent to distribute quantities of amphetamine and methamphetamine in violation of 21 U.S.C. § 846.

The trial of all defendants began on June 8, 1976 and on June 18, 1976, the jury returned a verdict of guilty on all counts as to Daniel H. George, Jr., guilty as to

Count VII with respect to Joan Leavitt, the only count in which she was named, and not guilty as to both counts in which Daniel Pappalardo was named.* (Tr 1237-40)**

On August 3, 1976 Judge Coffrin sentenced Daniel H. George, Jr. to the custody of the Attorney General for a period of five years on each count with a special parole term of five years, the sentence on each count to run concurrently.***

On that same date defendant Jay Leavitt was sentenced to five years in the custody of the Attorney General on Counts I, II, III, IV, V, and VII and a special parole term of five years on each count, all to run concurrently. He also received a sentence of four years on Count VI, which was concurrent to the other sentences.

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* Jay Leavitt entered a plea of guilty to all counts of the indictment on the third day of trial, June 10. (Tr 332)

** Tr refers to Transcript. Other references are:
GA - Government Appendix; DB - Defendant's Brief;
DA - Defendant's Appendix; GX - Government Exhibit.

*** The sentence of the Court was stayed pending appeal.

The imposition of sentence as to defendant Joan Leavitt was suspended and she was placed on probation for a period of three years.

## STATEMENT OF ISSUES

## STATEMENT OF THE FACTS

In 1971 Jay Leavitt and Kenneth Lotfy each were engaged in the illicit distribution of amphetamine.* (Tr 342-43) They met in that year through co-conspirator Robert Melsard and proceeded thereafter with Melsard to import amphetamine from Canada along with other co-conspirators. (Tr 343) They continued to traffic in amphetamine until 1973 when Jay Leavitt and Lotfy were introduced to a clandestine chemist named Linwood Lamotte. (Tr 344-49) The connection with Lamotte did not work out satisfactorily and co-conspirators Pratt and Amaro agreed to introduce Jay Leavitt and Lotfy to their source for chemicals, equipment and drugs, Daniel H. George, Jr. (Tr 350; GA 10) Jay Leavitt and Lotfy paid a $2,500.00 fee to Amaro and Pratt for an introduction to George. (Tr 350; GA 10)

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* The conspirators at various times dealt in amphetamine and methamphetamine. They used both of those terms to refer to it as well as methedrine. Since amphetamine and methamphetamine are manufactured by virtually the same process and have essentially the same effects, the term amphetamine is used throughout this brief for purposes of uniformity. See Tr 352-53; GA 12-13; Tr 419-20, 775-82, 802, 819. Methedrine is the generic name for methamphetamine. (Tr 353)

One thousand dollars of this was for Pratt and Amaro with the remaining $1,500.00 to go to George for the introduction and initial chemicals and equipment. (Tr 352; GA 12) Leavitt and Lotfy met with George and discussed the manufacture* of amphetamine as well as the manufacture of phenol-2-propanone. (P2P) (Tr 352; GA 12) They made arrangements with George to pay him another $1,500.00 in exchange for which George would give to Lotfy detailed oral notes on the manufacture of amphetamine. (Tr 353; GA 13) George agreed to dictate at each session the exact steps, procedure and methods for producing amphetamine. (Tr 353-54; GA 13-14) George received an additional $500 for each session. (Tr 354; GA 14) Lotfy took notes of the dictation, typed them after the session and returned later to read them back to George for possible correction. (Tr 354; GA 14) George indicated to Lotfy that he would not provide Lotfy with any type of documents or a signature on any formal papers so that he could not be implicated

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* Various witnesses used interchangeably the term manufacture and synthesis to refer to the production of either P2P or amphetamine. The term manufacture is used throughout here to avoid confusion.

should Lotfy or Leavitt be apprehended or arrested. (Tr 354-55; GA 14-15) George listed certain chemicals and equipment as being part of the necessary ingredients, but coded them by using the letters A through E. (Tr 355; GX 22, 23, 23A, 23B, 23C; GA 1-5) This prevented Lotfy and Leavitt from purchasing the chemicals without George's help, which would have allowed them to eliminate him from the operation and his part of the profit. (Tr 355; GA 15) In addition to the complete formula for manufacturing amphetamine, a condensed version of the manufacturing process for amphetamine was also dictated (GX 22, GA 1-2; Tr 355-56; GA 15-16), as well as a formula for the manufacture of P2P, an ingredient essential to manufacture amphetamine. (Tr 356; GA 16) George indicated that he himself had researched at M.I.T. the P2P manufacturing process and was dictating it because he would not give Lotfy anything written down on paper "unless he be implicated in any conspiracy should the notes fall into the wrong hands." (Tr 360; GA 16) George indicated that P2P was commercially available but was a substance which was heavily monitored by the Federal Government and it was therefore unwise to purchase it. George thereafter supplied the hardware necessary for the manufacture of amphetamine for a fee of $1,200.00. (Tr 360, 361; GA 20, 21) Using this equipment, George,

Leavitt and Lotfy* produced a small quantity of P2P. (Tr 361-362; GA 21-22) George was aware that the reason for manufacturing the P2P was for Leavitt and Lotfy to use it to manufacture amphetamine and participated with Leavitt and Lotfy in a dummy run of the manufacture of amphetamine.** (Tr 362, 364; GA 22, 24) A remote location was used for the laboratory site because George recommended a location away from neighbors because of the pungent odors which would arise from the chemical reaction. (Tr 363; GA 23) Chemicals used in the manufacturing process were obtained from George and were

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* Although Lotfy was the one individual to whom the formulas were originally dictated, it appears that thereafter Leavitt and Lotfy were taught all steps together by George and Leavitt and Lotfy were equal participants with George. (Tr 361-65; GA 21-25)

** George used a chemical with reactions very similar to that of P2P and which would have the same type of chemical reaction as though a controlled substance was being manufactured but would in fact result in a totally innocuous product. (Tr 362; GA 22)

coded A through E. (Tr 363-64; GA 23-24) George thereafter provided the chemicals and equipment which enabled Lotfy and George to manufacture P2P and use the P2P to manufacture pure amphetamine. (Tr 365; GA 25) In the first run approximately ten to twelve ounces of amphetamine were manufactured. (Tr 364-65; GA 24-25) George was not present during the manufacturing process but when Leavitt and Lotfy had trouble or problems with the reaction, they contacted George by telephone to discuss the problems with them. (Tr 365; GA 15) George advised them how to alleviate the problem. (Tr 365; GA 25) Following the first manufacture of amphetamine Lotfy met with George the following day on the banks of the Charles River opposite M.I.T. (Tr 366; GA 26) George and Lotfy discussed the reaction, the success of the reaction and Lotfy took out a vial of the white crystalline amphetamine rock and showed several chunks of it to George. (Tr 366; GA 26) George stated that he was highly pleased with the results of the first reaction and if he were rating it on a scale A through D he would rate it A-. (Tr 366-67; GA 26-27) Lotfy informed George that they would need larger quantities of chemicals to make more amphetamine each time and George indicated how much it would cost.

(Tr 367; GA 27) The chemicals were obtained by giving George the money necessary for the chemicals and their rented car in the morning, and George would return in the evening with the vehicle and the chemicals in the trunk. (Tr 371; GA 31) The manufacturing process at this time was taking place in Chatham, Massachusetts. (Tr 372; GA 32) George indicated that the supply of the necessary chemical ingredients for the manufacture of P2P was becoming more scarce. (Tr 372; GA 32) One bottle of P2P however was obtained through Leavitt from a source in Vermont (co-conspirators Norman Holden and Gary Boyd supplied the bottle obtained from an undercover DEA agent on July 15, 1974) following which additional chemicals were obtained from George. (Tr 315-16, 326-27, 371; GA 31) Contact was maintained with George concerning the availability of chemicals and equipment and coded conversations over the telephone to George's telephone number were used to place orders. (Tr 375) During this time Jay Leavitt was dealing in ounces of amphetamine with Wayne and Norman Holden from Vermont. (Tr 376) George was using a rented vehicle and his same procedures to supply the chemicals needed for the manufacture. (Tr 376-77) At one point after the manufacturing was moved from Wingaersheek Beach in Gloucester, Massachusetts into Boston, George transported Leavitt and Lotfy

to Somerville, Massachusetts and left them there after they had given him money to purchase chemicals and equipment for the manufacturing process. (Tr 377; GA 35) George indicated that he left them there because he did not want them to know the location and identity of his chemical sources. (Tr 377; GA 35) George on that occasion returned as usual with the chemicals. (Tr 378; GA 36) In October of 1974 Lotfy was arrested on an unrelated charge and his relationship to George and Leavitt became somewhat strained so that thereafter George and Leavitt became more closely associated. (Tr 378-80; GA 36-38) Lotfy maintained contact with Leavitt's manufacturing operation by telephonic contact through George and periodically purchased amphetamine from Leavitt. (Tr 380-81; 384; GA 38, 39, 42) In October of 1974 Leavitt also indicated to Lotfy that there was a possibility that another source of P2P might become available and that he was purchasing more sophisticated equipment from George. (Tr 382-83; GA 39-40)

In February of 1975 Leavitt indicated to Lotfy that P2P was available through people in Vermont. (Tr 384; GA 42) He further indicated that he had learned a new process for the manufacture of P2P from George and he was using it to manufacture amphetamine at that time. (Tr 384; GA 42)

In June of 1975 Special Agent Harold Anderson of the Drug Enforcement Administration was introduced by a cooperating individual to Wayne Holden in Brattleboro, Vermont. (Tr 17-21) Wayne Holden indicated he could speak on behalf of a chemist and would be delivering P2P to the chemist. (Tr 24) An arrangement was made whereby Special Agent Anderson would trade quantities of P2P for amphetamine and a chemist associated with Wayne Holden would be the one to manufacture the amphetamine. (Tr 26-28) On June 5, 1975, Special Agent Anderson transferred one bottle of P2P to Wayne Holden. (Tr 32) On June 16, 1975 in Brattleboro, Vermont, Special Agent Anderson took delivery of 83 grams of amphetamine from Wayne Holden. (Tr 36-43, 756) Other deliveries of amphetamine in exchange for previously supplied P2P from Special Agent Anderson took place on June 30, 1975, 144 grams (Tr 43-56, 759), July 7, 1975, 330 grams (Tr 56-62, 761), July 15, 1975, 308.9 grams (Tr 62-71, 760-62, 766-67), and September 30, 1975, 899.6 grams (Tr 71-108, 765).* Wayne Holden and his confederates took the P2P to

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* Wayne Holden, Norman Holden and Duane Harris were indicted in criminal no. 75-73 together with Jay Leavitt, whose charges in 75-73 were superseded by criminal no. 76-2. The indictment in 75-73 charged Wayne Holden, Norman Holden, Duane Harris and Bruce Garland variously with sixteen counts which covered the distribution to Special Agent Anderson, use of a communications facility and conspiracy. Following a two-week trial in May, 1976, Wayne Holden was convicted on twelve counts and sentenced to concurrent terms of five years on each of the distribution counts and the

Jay Leavitt at varying locations in Massachusetts and New Hampshire for him to manufacture amphetamine using information he had obtained from George as well as

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continued:

* conspiracy count with a three year special parole term and four years on the communications facility counts, all to run concurrently. Norman Holden was sentenced as a Youth Offender pursuant to 18 U.S.C. § 5010(b) on the three counts in which he was convicted. Duane Harris was sentenced to two years imprisonment on each of the two counts on which he was convicted to be followed by a two year special parole term, all to run concurrently. Bruce Garland was acquitted of the only two counts in which he was named. Only defendant Harris appealed and his appeal is presently pending before this Court in docket no. 76-1382 which is scheduled for argument during the week of March 28, 1977.

chemicals and equipment he received from George.*

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* The Government established this during the trial by means of testimony with regard to aerial and ground surveillances of various conspirators, telephone toll records, other documents, the testimony of informants and statements made by George after he was arrested in which he admitted tutoring Leavitt and Lotfy in chemistry. See generally TR 188-331, 394-99, 811-23, 828-42, 881-89; GX 16-19, 31, 56, 63-72. Since defendant George's trial and appellate theories have not been to question that George was the supplier of the formulas, chemicals and equipment used by Leavitt to manufacture the amphetamine delivered by the Holdens to Special Agent Anderson, that factual aspect of the case is not discussed in detail herein.

After Wayne Holden met Special Agent Anderson in June of 1975 Holden informed Lotfy that P2P had become available and asked Lotfy to contact Leavitt to inform him of this fact. (Tr 394; GA 43) Lotfy passed this message to Leavitt through George (Tr 394-95; GA 43-44) The message given to George was "contact the boys up north that Ketone was available."* (Tr 395; GA 44)

On July 1, 1975 George picked up chemical supplies from three chemical supply companies and used a blue station wagon with wood paneling and a travel roof rack for transportation. (Tr 632-34) On July 7, 1975 George again picked up chemical supplies at a chemical supply company using this same blue station wagon with Massachusetts registration N-73951. (Tr 642-43) This car was registered to Joan Leavitt, Jay Leavitt's wife. (Tr 827-28; GX 72)

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* Ketone was a term used to refer to P2P since phenol-2-propanone comes from that group of chemicals. Tr 353; GA 13.

On July 8, 1975 George picked up chemical supplies from a chemical company and used a van for transportation. (Tr 653) This van was owned by Bruce Genest (Tr 659, 661, 866; GA 69) an illicit manufacturer of methamphetamine who received his supplies and chemical formula (coded) from George. (Tr 855-867; GA 58-70; GX 38-54; see footnote p.27 infra)

In July of 1975 Leavitt informed Lotfy that he was getting P2P from the boys up north and that it was a steady supply. (Tr 395; GA 44) Sometime during August or September of 1975 George told Lotfy that Leavitt had picked up six bottles of P2P from the boys up north. (Tr 399; GA 45)

On September 19, 1975 DEA Special Agent Dennis Walczewski, a former DEA chemist, while acting in an undercover capacity, met with defendant George. (Tr 699-700; GA 49-50) Walczewski stated to George that he was interested in purchasing methylene, to which George replied: "You are interested in making methamphetamine." (Tr 702; GA 52) Walczewski indicated that this was correct, stated that he made enough to make a large profit off it once or twice a year, and asked if George could supply him with P2P. (Tr 702; GA 52) George said he could not since it was highly controlled by the Government, but that he, George, would look up a formula for producing P2P for Walczewski for a fee. (Tr 702; GA 52) George

indicated that he could obtain the methylene that Walczewski was seeking even though it was under Government control because he had been dealing with various chemical companies since he was twelve years old. (Tr 703; GA 53) George stated that Walczewski could purchase the chemicals and equipment he was seeking from George and that the price would depend upon the difficulty in getting the product, but it would be a certain percentage above the cost of the item. (Tr 703; GA 53) George also stated that he tutored chemistry to high school students,*

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Defendant contends that he was a chemistry tutor, teaching chemistry and supplying chemicals and equipment. DB 7. However, the only evidence of this is George's own statements to this effect to various people during the period of the conspiracy and after his arrest. Tr 688, 704; GA 54; Tr 748; GA 57. Defendant produced no legitimate purchasers for his chemicals or equipment nor anyone he had ever tutored. This despite the fact that chemical company invoices introduced by the Government showed George purchased chemicals and equipment costing in excess of $8,300 over approximately an 18 month period beginning in July of 1974. GX 57-62. All of the chemicals and equipment could be used to manufacture methamphetamine or amphetamine, as well as for other purposes. Tr 667-91, 771.

did research work and would supply chemicals and other apparatus to people who desired to buy it from him. (Tr 704; GA 54) Lastly, George stated during this conversation that he himself had manufactured everything from LSD to cocaine. (Tr 705; Ga 55)

In late September or early October of 1975, George arranged a meeting between the Leavitts and Lotfy at which time the arrest of the Holden brothers was discussed. (Tr 399; GA 45)

Shortly thereafter Leavitt realized that he was about to be arrested by Federal authorities and arranged to make a final manufacture of amphetamine before surrendering. (Tr 400) George indicated to Lotfy that he was very upset about the Leavitt situation and that Lotfy should take a more active part in the laboratory operation. (Tr 404; GA 46; Tr 407; GA 47; Tr 494)

On January 8, 1976 Lotfy, after he had begun to co-operate with the Government, placed a taped telephone call to George. (Tr 408-10, 589-600, GX 24A) During the conversation George stated that he had given Jay Leavitt some "supplies."* (GX 24A) George indicated that Leavitt had "something" about a week after George gave the supplies to Leavitt. (GX 24A) George further indicated that he assumed Leavitt would have some plans when he got back "along those same lines." (GX 24A) George indicated that

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* A code word for chemicals. Tr 491-92.

he expected to be getting Leavitt some supplies when Leavitt got back. (GX 24A) George and Lotfy discussed with George P2P which Jay Leavitt had been using, noting that Leavitt had told him that the P2P was quite refined, very pure. (GX 24A)

After his arrest on July 15, 1976 George stated that he was a chemistry tutor and that he had schooled Joseph Genest, Jay Leavitt and Kenneth Lotfy; that the teachings were done in a theoretical formula stage and in a laboratory phase involving practical laboratory work; that he had taught Lotfy a refresher course for pharmaceutical purposes; that he would only teach chemistry to those individuals who would not use it to do an illegal act and those people who would not use it for the process of making dangerous drugs and that he would not teach it to students who had criminal records or reputations. (Tr 745-49)

## ARGUMENT

AN INDIVIDUAL WHO IS AWARE OF A CONSPIRACY TO MANUFACTURE AND DISTRIBUTE CONTROLLED SUBSTANCES, WHO SUPPLIES THE MANUFACTURER/DISTRIBUTORS WITH CHEMICAL FORMULAS INTENDED EXCLUSIVELY FOR THE MANUFACTURE OF CONTROLLED SUBSTANCES, ASSISTS THEM IN MANUFACTURING A VITAL PRECURSOR CHEMICAL, GOES THROUGH A DRY RUN OF THE MANUFACTURING PROCESS WITH THEM, SUPPLIES THE MANUFACTURER/DISTRIBUTORS WITH ALL THEIR EQUIPMENT AND CHEMICALS, CODES SOME OF THE CHEMICALS TO FIT THE FORMULAS HE HAS SUPPLIED AND WHICH PREVENTS THE MANUFACTURERS FROM PURCHASING THOSE CHEMICALS FROM ANYONE BUT HIM, WHO DURING THE MANUFACTURING PROCESS TELEPHONICALLY DISCUSSES PROBLEMS INCURRED DURING THE PROCESS BY THE MANUFACTURERS, PROVIDES ADVICE AS TO HOW TO CORRECT PROBLEMS AND WHO EVALUATES THE QUALITY OF THE CONTROLLED SUBSTANCE AFTER IT IS MANUFACTURED IS A MEMBER OF THE CONSPIRACY TO MANUFACTURE AND DISTRIBUTE THE CONTROLLED SUBSTANCES.

Defendant George has raised as a defense to the indictment the "innocent seller" doctrine which originated in this circuit in United States v. Falcone, 109 F.2d 579 (2d Cir.), aff'd, 311 U.S. 205 (1940). (DB 10) The Government submits that the factual position of the defendant here is unlike that of the defendants in Falcone and that even if Falcone had not been somewhat modified by later cases, the defendant herein could have been found by the jury to be a member of the conspiracy under Falcone.

Judge Hand indicated in Falcone that the seller of goods, in and of themselves innocent, does not become a conspirator with the buyer simply because he knows that the buyer means to use the goods to commit a crime. 109 F.2d at 581. The court held that more is required than that defendant forego a normal, lawful activity; he must promote the venture himself and have a stake in its outcome. Id. The Supreme Court's consideration of the Government's appeal in Falcone is slightly confusing in that it appears that the issue which originally brought the case to the Supreme Court was not that actually argued by the Government in the Supreme Court. United States v. Falcone, 311 U.S. 205, 207-08 (1940).

What is in effect a modification by the Supreme Court of the Falcone doctrine however was that the Court appeared to decide the case on the ground that the indictment did not allege knowledge of the existence of the conspiracy by the defendants. Id. at 207-08. Other cases since Falcone have pointed out this modification by summarizing the Falcone holding:

> That decision [Falcone] comes down merely to this, that one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally.

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* The conspiracy count in this case alleged in part: "Daniel H. George, Jr. . . .the defendants. . . and co-conspirators, unlawfully, willfully and knowingly did combine, conspire, confederate and agree together with each other and with other persons to the Grand Jury unknown. . . ." DA 4.

Direct Sales Co. v. United States, 319 U.S. 703, 709 (1943).*

Since Falcone this court has indicated that the holding of that case is very limited. In United States v. Tramaglino, 197 F.2d 928 (2d Cir.), cert. denied, 344 U.S. 864 (1952), marijuana traffickers caught in a chain conspiracy tried to rely on Falcone. The court stated:

> We have limited that case [Falcone] to its strict facts - the case of a supplier of goods, innocent in themselves, who does nothing but sell those goods to a purchaser who, to supplier's knowledge, intends to and does use them in the furtherance of an illegal conspiracy.

Id. at 930. The court concluded that the defendants in Tramaglino had made illegal sales which aided and abetted the conspiracy by illegal acts, leading to the conclusion that the "added element of personal law-breaking and clandestine selling furnished the required 'stake in the success of the venture' that the Falcone case demanded." Id. at 931.

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* It is noteworthy that the Supreme Court in Direct Sales stated specifically that the Government in Falcone had conceded there was insufficient evidence in the case to be able to conclude that there was a conspiracy between the buyer and the seller. The court seemed to suggest that this concession might have been overbroad under the circumstances. Id. at 709-10.

In United States v. Russo, 284 F.2d 539 (2d Cir. 1960) the court referred to Falcone and indicated that it was strictly limited to its facts, as other cases since Falcone had held. Id. at 541 n.3. In United States v. Campisi, 306 F.2d 308 (2d Cir. 1962), cert. denied, 371 U.S. 925 (1963), the court noted that United States v. Piampiano, 271 F.2d 273 (2d Cir. 1959) held that any deviation from the strict facts of Falcone, even a lawful departure from the normal course of business or cooperation in concealing delivery, was sufficient to connect the vendor with the criminality of the vendee. Id. at 311.

Other circuits which have considered Falcone and its import have reached similar conclusions. In Goodman v. United States, 128 F.2d 854 (9th Cir. 1942) the court indicated its belief that Falcone was limited to the situation where the defendant had no knowledge of the conspiracy by others. The court then applied Falcone and reversed the conviction because it concluded that although a defendant in that case acted as a broker for diamonds which were being shipped to Japan without a license, there was nothing to show that the defendant was aware the diamonds would be exported. In effect, he had no knowledge of any conspiracy to do this illegal act.

Id. at 856. In United States v. Giuliano, 263 F.2d 582 (3d Cir. 1959) the court quoted from Direct Sales concerning what Falcone stood for and its very limited proposition. Id. at 585. The court specifically emphasized that Direct Sales had limited Falcone to the situation of an individual who had no knowledge of the conspiracy and who without more furnished supplies to illicit distillers was not guilty of a conspiracy even though his sale might have furthered the object of the conspiracy to which the distiller was a party, but of which the supplier had no knowledge. Id. In United States v. Steele, 469 F.2d 165 (10th Cir. 1972) the court referred to Falcone and indicated that it stands for the proposition that the defendant must have knowledge of the conspiracy. Id. at 169. The court applied the Falcone doctrine and found that a defendant who had only provided a pilot to co-defendants without knowing of the conspiracy to smuggle controlled substances into the United States was not himself guilty of conspiracy. Id. at 169. In United States v. Salerno, 485 F.2d 260 (3d Cir. 1963), cert. denied sub nom., Rossi v. United States, 415 U.S. 994 (1974) the court stated that Direct Sales "rejected the argument that one who sells articles used by a conspiracy cannot be found guilty of that conspiracy." Id. at 262. The court indicated

that one who does sell to a conspirator with knowledge of the conspiracy can become a party to the conspiracy by aiding and abetting." Id. at 262-63, citing Direct Sales at 709.

Under Falcone and the cases which have followed it, the actual issue for determination by this court is similar to that which the court faces frequently in conspiracy cases: was the activity of the defendant herein sufficient to establish his participation in the conspiracy? The Government submits that on the basis of the facts and in keeping with Falcone and its progeny, the Government established that a conspiracy to manufacture amphetamine existed and that more than the "slight evidence" required was furnished to show George's participation in the conspiracy. See United States v. Marrapese, 486 F.2d 918, 921 (2d Cir. 1973), cert. denied, 415 U.S. 994 (1974).*

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* Numerous cases from different circuits suggest that many different types of activity would be sufficient for George to be found to be a member of the conspiracy here. See, e.g., United States v. Green, 511 F.2d 1062 (7th Cir.), cert. denied, 423 U.S. 1061 (1975); United States v. Lemons, 309 F.2d 168 (4th Cir. 1962), cert. denied, 371 U.S. 968 (1963); United States v. Carlucci, 288 F.2d 691 (3d Cir.), cert. denied, 366 U.S. 961 (1961); Fgan v. United States, 137 F.2d 369 (8th Cir.), cert. denied, 320 U.S. 788 (1943). Cf. United States v. Steinschreiber, 219 F. Supp. 373 (S.D.N.Y. 1963), aff'd, 326 F.2d 759 (2d Cir.), cert. denied, 376 U.S. 962 (1964).

The evidence here showed that Daniel A. George, Jr., did not simply pass on chemicals and other innocent materials at regular prices, but from the very beginning charged substantial fees for formulas to manufacture amphetamine and a necessary precursor chemical. A fee of $2,500.00 was charged for the initial introduction of Kenneth Lotfy and Jay Leavitt to Daniel George and it is clear that of the $2,500.00 fee for the introduction, $1,500.00 of this went for the introduction itself to take place, for George to be willing to provide detailed oral notes on the manufacture of amphetamine and for one initial shipment of chemicals. (Tr. 351-53; GA 11-13) A further $500.00 was charged for each two and one-half hour session in which George orally dictated the notes to Kenneth Lotfy. (Tr 354; GA 14) Lotfy also testified that the prices George charged for equipment in 1974 were three to four hundred percent higher than the prices Lotfy was familiar with for such equipment in 1970, and probably two to three times their cost at that time. (Tr 554; GA 48; Tr 578) Neither Falcone nor any of the cases which have brought defendants within it have had this situation. Further, as noted by the defendant himself,(DB 14, 15) although George's profits may have been less than those of Leavitt and Lotfy, he nonetheless was reaping a very high profit on the items he was selling.

See Direct Sales Co. v. United States, 319 U.S. 703, 713 (1943).

The formula dictation format George utilized also suggests guilty knowledge by George since he specifically told Lotfy that this method was used so that there never would be any documents or anything which would implicate him.* (Tr 354) Further, the coded formulas supplied by George were intended to match the coded chemicals he supplied, thus making him an indispensible link in the manufacturing process and in effect soliciting additional sales. In the words of Kenneth Lotfy:**

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* The clandestine approach taken by George throughout his dealings with Leavitt and Lotfy, in addition to other evidence, was clearly sufficient to allow the jury to find that George was not acting with innocent knowledge and intent.

** In addition to the testimony of admitted co-conspirator Lotfy, the Government was able to obtain the testimony by means of an immunity order of Bruce Genest, a convicted and incarcerated methamphetamine manufacturer, who obtained formulas, chemicals and equipment, and know-how from George in a manner substantially similar to that used in this case. (See generally Tr 857-67; GA 60-70) Specifically, both Lotfy and Genest testified that George dictated the notes orally (Tr 353, 862; GA 13, 65) was aware that Leavitt and Lotfy as well as Genest intended to use the formulas to manufacture amphetamine (Tr 353, 857, 864; GA 13, 60, 67); provided formulas for the manufacture of both amphetamine and the necessary precursor P2P (Tr 356, 859; GA 16, 62); provided chemicals in bottles without labels and which were coded with letters so that George could be the only

Q: Now when Mr. George gave you the oral dictation, did he name for you all the chemicals, or how did he handle them?

A: Certain chemicals he named and other chemicals were coded in the form of 'A' through 'E'.

Q: Did Mr. George say anything to you about why he used the terms reduct 'A', 'B', 'C', 'D', and 'E'?

A: Yes, this was so we could not purchase these chemicals without his help, therefore eliminating him from the operation and his part of the profit.

(Tr 355; GA 15)

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continued:

* source of supply (Tr 355; GA 15; Tr 493, 864; GA 67) indicated that they should not buy P2P commercially since it was closely monitored by the Federal Government (Tr 360; GA 20; Tr 880); would not be present during the manufacturing process but provided assistance over the telephone (Tr 362; GA 12; Tr 476, 862, 863; GA 65-66; Tr 877, 880); and went to the chemical supply houses to obtain the chemicals himself, on occasion using their vehicles. (Tr 376, 380; GA 38; Tr 865-66; GA 68-69)

** The dictated formulas as typed up by Lotfy were later turned over to agents of the Drug Enforcement Administration after Lotfy began to co-operate with the Government and became Government Exhibits 23A, 23B, 23C. (GA 3, 4, 5; Tr 355-59, GA 15-19, 411-12)

Under these circumstances George fails to meet even the preliminary test of Falcone, that is that he did not have knowledge of the conspiracy. The teachings of a formula specifically designed for the manufacturer of amphetamine or methamphetamine to persons whose avowed purpose in receiving it was to use it to manufacture those substances, who in fact manufactured it with his advice and who had to keep returning to him alone for chemicals and equipment overwhelmingly illustrates George's knowledge of the existence of the conspiracy. This itself removes him from Falcone. Direct Sales Co. v. United States, 319 U.S. 703, 709 (1943). Further, the evidence unquestionably shows that George not only knew of the conspiracy but also was a member of it. In fact, in view of George's role, the manufacturing part of the conspiracy could not have existed without George's willingness to supply the coded chemicals to go with his coded formulas.

George's activities in dealing with the persons he supplied were at all times inconsistent with innocent intentions. In addition to excessive profits and the coded formulas, George never let anyone see where he was getting the chemicals, destroyed receipts he received from the chemical companies (Tr 636-38; GX 27, 27A; GA 6, 7) and took labels off the containers and repackaged chemicals

in unmarked containers, a procedure which defendant's own chemist suggested was unsafe. (Tr 1005-06)

George also was not in the least bit unwilling to supply chemicals and equipment to a DEA undercover agent even after concluding that the agent wished to use those items to manufacture methamphetamine. (Tr 702) His prices were to depend however on how difficult the item was to obtain. (Tr 703) George also indicated that he himself had manufactured everything from LSD to cocaine, illustrating his own manufacturing background. (Tr 705) It also is inherently obvious that one who knows the formula for manufacturing a controlled substance and can provide advice during the manufacturing process as well as grade it, has had significant experience in manufacturing himself.

George cannot even overcome the first step in Falcone, lack of knowledge of the conspiracy, but his claim fails for numerous other reasons.

One reason is that noted in Direct Sales:

> All articles of commerce may be put to illegal ends. But all do not have inherently the same suspectibility to harmful and illegal use. Nor, by the same token, do all embody the same capacity, from their very nature, for giving the seller notice the buyer will use them unlawfully.

319 U.S. at 710.

Clearly, the formula, chemicals and specifically the P2P supplied here were intended to be used for an illegal nature. Also, the situation here of, in effect, forcing the return of customers through the use of the coded formula is somewhat similar to that in United States v. Piampiano, 271 F.2d 273 (2d Cir. 1959), where the defendant who had purchased sugar for a still attempted to fall within the Falcone doctrine. The court noted that the defendant, however, had deviated from his usual line of business in purchasing large quantities of sugar and did not sit back and simply accept orders that came his way but began dealing in a commodity almost entirely new to him and in a manner quite different from his other business transactions. Id. at 274. George also insulated the purchasers of chemicals from the authorities by buying the chemicals for them as was done in Paimpiano. Id. at 274-75. The court in Piampiano had decided that participation in conspiracy was a jury question as had been decided in the case of United States v. Pandolfi, 110 F.2d 736 (2d Cir.), cert. denied, 310 U.S. 651 (1940). Other cases with varying fact patterns also would find George to be a participant in the conspiracy by virtue of his acts. In United States v. Loew, 145 F.2d

332 (2d Cir. 1944), cert. denied, 324 U.S. 840 (1945) the defendant attempted to come within Falcone and Direct Sales after having sold large quantities of sugar to co-defendants with knowledge that those to whom he was supplying it were using it at a still. The court found him to be a co-conspirator because the sales were not normally made at his place of business; he arranged to take the orders by telephone using coded words; he delivered the sugar furtively at night and he concealed the purchases by failing to make the record of sugar sales required by Government regulations. Id. at 332-33. In United States v. Pecoraro, 115 F.2d 245 (2d Cir. 1940), cert. denied, 312 U.S. 689 (1941), the defendant sold distillers a denatured alcohol called "anti-freeze," and did not maintain the record of the names of buyers required by the Government. Id. at 246. The court found consciousness of guilt based on the above facts and his disposal of some drums of the alcohol found at the still after he had sold but not reported them. Id. The court found it to be significant that defendant Gross had shielded the buyers and actively assisted their project. Id. The Government submits that George's conduct here was substantially similar by virtue of the insulation he provided to the manufacturers.

In United States v. Yaniz-Cremata, 503 F.2d 963 (5th Cir. 1974) the court upheld a cocaine conspiracy conviction based upon the fact that co-conspirators after importing cocaine took it to the defendant's barbershop and after discovering it closed, called the defendant. Id. at 963-64. He supplied them with cutting material for the cocaine, explained how to use this material and told them to get out of Maimi rapidly because this was a hot area. Id. He gave the co-conspirators his telephone number for use if they needed it to contact another importer at a later time. Id. The court in addition to ruling on the facts which had taken place indicated: "It is of no moment that appellant received no pay for his aid." Id. at 964. In United States v. Kuntzweiller, 487 F.2d 426 (9th Cir. 1973), cert. denied, 417 U.S. 910 (1974) defendant was convicted of conspiracy to manufacture amphetamine and methamphetamine. The court held the evidence of a conspiracy was sufficient where the conspirators had purchased equipment to make the controlled substances, offered to pay another conspirator in amphetamine, marked false sales slips cash to avoid detection, used an alias and falsified records to avoid identification of the true purchaser. Id. at 428.

In Call v. United States, 265 F.2d 167 (4th Cir.), cert. denied sub nom. Pearson v. United States, 361 U.S. 815 (1959) defendant Pearson actively promoted sales of sugar to illegal distillers and protected the identity of the purchasers and, on some occasions, made clandestine deliveries. This was held enough. Id. at 171. In Van Huss v. United States, 197 F.2d 120 (10th Cir. 1952), the defendant had supplied titles off junk cars for use by a car ring. He had no role in the theft itself, but knew the purpose the titles would be put to. On one specific occasion, he had shown another conspirator how to wire around an ignition after other defendants had trouble with it. Id. at 122. This situation is certainly analogous to George's assistance to Leavitt, Lotfy and Genest during the manufacturing process when they had trouble with the procedure.

The Government submits that defendant George simply does not factually fit into the innocent seller doctrine. As noted previously by this court:

> As in most of the narcotics conspiracy cases presented to the appellate courts, appellant seizes upon various well known cases dealing with quite dissimilar fact situations and endeavors to fit the facts of his case into the pattern of those cases in which other appellants have been successful, so that he can argue for a similar result.

United States v. Rich, 262 F.2d 415, 417 (2d Cir. 1959).

Defendant George likewise fails for the reason described in Rich.

## CONCLUSION

The conviction of defendant George on all counts should be affirmed.

Respectfully submitted,

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